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No. 82-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. A BOILERPLATE CHARGE OF DISCRIMINATION FAILS TO PROVIDE RESPONDENTS SUFFICIENT NOTICE IN ACCORD WITH SECTION 706(B) OF TITLE VII	4
A. The Statutory Mandate Is Clear And Unambiguous: Title VII Requires that Every Notice of Charge Must Contain A Statement Of The Date, Place And Circumstances of the Alleged Unlawful Employment Practices	4
B. If A Charge Is Filed Which Is Found To Be Defective, The EEOC Is Not Authorized To Conduct An Investigation Or To Enforce Its Administrative Subpoena	10
II. THE EEOC MAY NOT DEPRIVE RESPONDENTS OF THEIR RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION	11
A. EEOC's Investigation is Unauthorized	11
B. The Proposed Search Is Unduly Burdensome	12
C. EEOC's Method Of Initiating The Investigation Was Unreasonable	13
III. THE USE OF THE COMMISSIONER'S CHARGE IS AN INEFFICIENT MECHANISM FOR REMEDYING SYSTEMIC EMPLOYMENT DISCRIMINATION	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Copeland v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980)	17
EEOC v. *Appalachian Power Co.*, 12 FEP 1294, 1295, (W.D. VA. 1976), *aff'd for reasons set forth by District Court*, 568 F.2d 354 (4th Cir. 1978)	7, 10
EEOC v. *C.A. Norgren Company*, 535 F. Supp. 491 (D. Colo. 1982), *appeal docketed*, No. 82-1578 (10th Cir. 1982)	2, 7
EEOC v. *A.E. Staley Mfg. Co.*, No. 82-1655, slip op. (7th Cir. July 1, 1983)	8
EEOC v. *Dean Witter & Company*, 643 F.2d 1334, (9th Cir. 1980)	10
EEOC v. *K-Mart Corporation*, 694 F.2d 1055 (6th Cir. 1982)	2
EECO v. *Michael Construction Company*, 31 FEP 1081 (1983)	8, 9
EEOC v. *Neches Butane Products Company*, 31 FEP 1099 (5th Cir. 1983)	2
EEOC v. *Sears, Roebuck & Company*, 490 F. Supp. 1245 (M.D. Ala. 1980)	10
General Telephone Company v. *EEOC*, 446 U.S. 318 (1980)	17
Genuine Parts Company v. *FTC*, 445 F.2d 1382 (5th Cir. 1971)	12
Marshall v. *Barlow's Inc.*, 436 U.S. 307 (1978)	11, 12
New Orleans Public Service, Inc. v. *Brown*, 369 F. Supp. 702, *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975)	7, 10, 12
Oklahoma Press Publishing Company v. *Walling*, 327 U.S. 186 (1945)	12
See v. *City of Seattle*, 387 U.S. 541 (1967)	11, 12
Shell Oil Company v. *EEOC*, 676 F.2d 322 (8th Cir. 1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 1181 (1983)	8, 10
Stater Bros. Markets v. *EEOC, appeal docketed*, No. 82-5507 (9th Cir., 1982)	3
Stewart v. *Core Laboratories, Inc.*, 460 F. Supp. 931, 933 (N.D. Tex. 1978)	7, 10

TABLE OF AUTHORITIES—Continued

Page

St. Regis Paper Company—Kraft Division v. *EEOC, appeal docketed*, No. 83-3558 (9th Cir.).. 2

United States v. *Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 387 (1981) 11, 12, 13, 15

United States v. *Morton Salt Co.*, 338 U.S. 632 (1949) 13

Statute

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* .....*passim*

Miscellaneous

29 C.F.R. § 1601.9 7

29 C.F.R. § 1601.12(a) 7

Examination of Certain Financial Management Practices Within the Equal Employment Opportunity Commission Hearing Before the Committee on Labor and Human Resources, United States Senate, 97th Cong., 2nd Sess. 29 (1982).. 16, 18

GAO Report to the Chairman, Commitee on Labor and Human Resources, "Financial Management Problems at the EEOC" (October 30, 1981)..... 18

GAO Report to the Congress: "Further Improvements Needed in EEOC Enforcement Activities" (April 9, 1981) 17, 18

Interpretative Memorandum of Title VII of Senators Case and Clark, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W.S. Hein & Co.) 5, 6

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States ("Chamber") is the largest association of business and professional organizations in the nation. Its current membership exceeds 213,000 members, including 209,000 cor-

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[1] This brief is being filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The parties' letters of consent are being filed with the brief.

porations, partnerships, proprietorships, and individuals, as well as 2,600 state and local Chambers of Commerce, and 1,200 trade and professional associations. The Chamber regularly represents its members' interests in litigation raising a broad cross section of issues, including Title VII issues.[2]

The issues in this case are of particular interest to our members as they deal with the parameters of a government agency's investigative powers. The Equal Employment Opportunity Commission ("EEOC" or "Commission"), unlike many government agencies, lacks plenary authority to conduct investigations. Quite the contrary, the EEOC is authorized to launch an investigation only after the respondent has been served with notice of a valid charge of discrimination.

The Commission itself may file a charge only to protect an alleged discriminatee who wishes to remain anonymous, or when it has other information on which to base a sworn belief that an employer has violated Title VII of the Civil Rights Act of 1964. The Chamber believes that the charge which precipitated this litigation was an abuse of the agency's authority. Moreover, the Chamber believes that the Commission has utilized substantially identical charges to investigate numerous other employers. *See e.g., St. Regis Paper Company—Kraft Division* v. *EEOC, appeal docketed,* No. 83-3558 (9th Cir. 1982); *EEOC* v. *K-Mart Corp.,* 694 F.2d 1055 (6th Cir. 1982); *EEOC* v. *Neches Butane Products Company,* 31 FEP 1099 (5th Cir. 1983); *EEOC* v. *C.A. Norgren Company,* 535 F.Supp. 491 (D. Colo. 1982), *appeal docketed,* No. 82-

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[2] *E.g., Newport News* v. *EEOC* —— U.S. ——, 51 U.S.L.W. 4837 (June 20, 1983); *EEOC* v. *K-Mart,* 694 F.2d 1055 (6th Cir. 1982); *U.S. Postal Service Board of Governors* v. *Aikens,* —— U.S. ——, 75 L.Ed.2d 403 (1983).

1578 (10th Cir. 1982); *Stater Bros. Market* v. *EEOC*, *appeal docketed*, No. 82-5507 (9th Cir. 1982).

This practice of the Commission has affected many members of the business community and has the potential to affect a much larger number, since every employer of 15 or more persons is covered under Title VII. It is for these reasons that the Chamber files this *amicus* brief.

SUMMARY OF ARGUMENT[3]

A fundamental requirement when filing any Title VII charge is to provide notice setting forth the specific time of the alleged discrimination and the actual basis for the charge to the employer. The charge lodged against Shell Oil Company ("Shell" or the "Company") fails to satisfy this requirement; thus, it is jurisdictionally deficient.

Faced with a deficient charge, the EEOC is unauthorized to conduct an investigation and any subpoena issued pursuant thereto is likewise invalid.

Moreover, the EEOC's subpoena fails to satisfy the Fourth Amendment test of reasonableness in three critical respects: (1) it lacks the mandatory statutory prerequisites of specific dates and circumstances; (2) it is unduly burdensome in its indefiniteness and overbreadth; and (3) it fails to show a reasonable basis for the inspection.

Finally, the commissioner's charge is an inefficient means for remedying patterns and practices of employment discrimination. The program is unsuccessful in furthering the agency's goal of ensuring equal employment opportunities and constitutes an inefficient use of government resources.

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[3] In the interest of brevity the Chamber will not restate the facts of this case. Rather, the Chamber incorporates by reference the facts as stated by Respondent Shell Oil Company.

ARGUMENT

I. A BOILERPLATE CHARGE OF DISCRIMINATION FAILS TO PROVIDE RESPONDENTS SUFFICIENT NOTICE IN ACCORD WITH SECTION 706(B) OF TITLE VII.

A. The Statutory Mandate is Clear and Unambiguous: Title VII Requires That Every Notice of Charge Must Contain a Statement of the Date, Place and Circumstances of the Alleged Unlawful Employment Practices.

Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(b) ("Title VII" or the "Act"), sets forth in clear and straightforward language the mandatory precedents to a valid charge of discrimination.

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a *notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer* . . . within ten days, and shall make an investigation thereof. Charges shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires. [emphasis added].

As originally enacted in 1964, section 706(a)—the predecessor to section 706(b)—of Title VII provided:

> Whenever . . . a written charge has been filed by a member of the Commission where he has *reasonable cause* to believe a violation of this title has occurred (and such *charge sets forth the facts* upon which it is based) . . . the Commission shall furnish [the charged party] with a copy of such charge.

42 U.S.C. § 2000e-5(a) (1970) [emphasis added].

Two requirements were manifest under subsection (a). First, before a commissioner's charge could be issued, a commissioner was required to have "reasonable cause" to believe that Title VII had been violated. Second, the facts upon which the charge was based had to be set forth therein.

The framers of Title VII left little doubt as to the meaning of this language. The legislative history of the 1964 Act shows that Congress intended section 706(a) to be a substantial restraint upon EEOC's authority to issue commissioner's charges.

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a *specific charge* has been filed in writing. In this respect, *the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission. 15 U.S.C. 43, 46, or of the Wage and Hour Administrator, 29 U.S.C. 211, who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing.*

Interpretative Memorandum of Title VII of Senators Case and Clark, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W.S. Hein & Co.), at 3054 [emphasis added].[4]

In explaining the requirement during floor debate, Representative Goodell of New York stated:

> Mr. Chairman, I think the chairman will agree with me that this is a section that is to protect us from errant and arrogant bureaucracy—from an adminis-

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[4] Senators Case and Clark were the floor managers for H.R. 7152, the version of Title VII initially approved by the House. Although changes were made in the Senate, those changes did not alter the provisions discussed above. The Case-Clark memorandum was the sole Congressional report concerning the investigatory powers of the EEOC, and aside from the Act itself, the preeminent expression of legislative intent with respect to those powers.

> trator running wild without any reasonable cause . . . . We very carefully provided that there had to be reasonable cause to believe that there had been a violation before any administrator moved into the situation.

Legislative History, Titles VII and XI of the Civil Rights Act of 1964, *supra*, at 3313 [emphasis added]. Similarly, the Chairman of the House Judiciary Committee, Representative Celler of New York, stated:

> In other words, we want to be sure that before the member of the Commission acts he has *reasonable cause to believe* a violation of the act occurred. *We want unequivocally to nail down that condition precedent* and, therefore, we provide for this additional language.

Id. [emphasis added]. From its enactment, then, Title VII proscribed the issuance of commissioner's charges except when the commissioner possesed sufficient facts to support a reasonable belief that violations of the Act had occurred.

In 1972, Congress amended section 706 to its present form. The revised requirements for the issuance of commissioner's charges made two primary changes in the law, both of which placed significant new burdens on the EEOC. *See*, p. 4 *supra*. First, whereas former section 706(a) required only that a commissioner have "reasonable cause" for issuing a charge, amended section 706(b) directs that all charges, including commissioners' charges, must be under oath or affirmation. Second, while former section 706(a) required only that charges set forth "the facts" on which they were based, amended section 706(b) provides that specific notice of the "date, place and circumstances" of the alleged acts of discrimination must be given to the respondent.[5]

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[5] Section 706(b) also provides that the charge "shall contain such information and be in such form as the Commission requires." Thus, it is important to stress that the EEOC's own regulations require a

Moreover, by amending section 706 in 1972 to require an EEOC commissioner to file a charge under oath, Congress intended that a commissioner should exercise heightened responsibility in the charging process above and beyond that responsibility which had been required under section 706(a) of the 1964 legislation. The United States Court of Appeals for the Fourth Circuit adopted the following district court explanation of the effect of the 1972 amendment:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief, for issuance of a commissioner's charge, certainly creates a stricter burden on the Commission . . . . [T]hat is the clear import of the language Congress placed in the Act of 1972.

EEOC v. *Appalachian Power Co.*, 13 FEP 1294, 1295 (W.D. Va. 1976), *aff'd for reasons set forth by District Court*, 568 F.2d 354 (4th Cir. 1978). Another court has concluded:

> [T]he 1972 amendment requires the Commission to file charges "upon an oath or affirmation," rather than upon the less onerous requirements of "reasonable cause."

Stewart v. *Core Laboratories, Inc.*, 460 F.Supp. 931, 933 (N.D. Tex. 1978). *See also EEOC* v. *C.A. Norgren*, 535 F.Supp. 491, 494 (D.Colo. 1982), *appeal docketed*, No. 82-1578 (10th Cir. May 11, 1982); *New Orleans Public Service, Inc.* v. *Brown*, 369 F.Supp. 702, 707-08, *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975).[6]

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written, verified charge that includes a "clear and concise statement of the facts, incluring pertinent dates[.]" 29 C.F.R. § 1601.12 (a)(3); *see also* 29 C.F.R. § 1601.9.

[6] While deciding this case under the pre-1972 standard, the Fifth Circuit recognized the more restrictive post-72 standard. Equally important, we note that the charge under review contained substantial statistical information, unlike the charge lodged against Shell Oil.

Thus, having plainly heightened EEOC's responsibility in the filing of commissioner's charges, Congress instructed the EEOC to pursue an investigation based on such a charge only if it can articulate some specific time and factual basis for filing the charge. The charge lodged against Shell Oil is devoid of any information that would satisfy this requirement. *See, Shell Oil Co.* v. *EEOC*, 676 F.2d 322, 323-4 (8th Cir. 1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 1181 (1983). Rather, it consists entirely of boilerplate language; it alleges that the Company has violated the Act since July 2, 1965, its effective date, and it alleges discrimination only in the broadest generic terms without reference to any specific practices or acts. *Id.*

The Chamber respectfully submits that the Court of Appeals for the Eighth Circuit correctly construed the Act to require that the EEOC "inform the employer of the approximate dates of the unlawful practices", and "to the extent possible, the Commission should include in the charge the factual basis for the Commissioner's belief that a Title VII violation has occurred (footnote omitted)." *Id.* at 325 and 326.[7] To construe the Act otherwise, is to eliminate the term "circumstances."

We stress that the Eighth Circuit did not retreat from its position in its more recent decision in *EEOC* v. *Michael Construction Co.*, 31 FEP 1081 (1983). That case was brought by an individual, and the panel correctly recognized the desirability of construing individual charges in a liberal manner to effect the purposes of the

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[7] The Chamber is aware that a majority of a Seventh Circuit panel has recently disagreed with the Eighth Circuit. *EEOC* v. *A. E. Staley Mfg. Co.*, No. 82-1655 (7th Cir. July 1, 1983). The Chamber believes that the dissent in that case correctly states that the majority decision fails to give proper consideration to the language of section 706(b). Slip op. at 17.

Act. *Id.* at 1083. The panel also expressly found that the individual had—

> unequivocally charged that the company discharged him and gave false information to the employment office after his discharge. Thus, the charge *specifically* [described] the *actions* "complained of" and was legally sufficient, even under a conservative construction standard. (footnote omitted)

Id. at 1083-4 (emphasis in original).

The panel expressly distinguished *Shell*:

> This reading of the "circumstances" language is not inconsistent with our holding in Shell Oil Co. v. United States EEOC, 676 F.2d 322, 29 FEP Cases 1519 (8th Cir. 1982), cert. granted, 103 S.Ct. 1181 (1983). In Shell Oil, a panel of this Court found the charge and notice in a Title VII case initiated by the Commissioner insufficient to support an action to enforce an EEOC investigatory subpoena. The charge and notice in that case, however, cited no specific actions by the employer which were allegedly motivated by racial animus nor any statistics indicating disparate impact. Without "some factual or statistical basis" underlying the EEOC's general allegation of "discrimination in all areas of employment practice," the panel held that the notice was insufficient. Id. at 326. In the instant case, the notice of Jackson's charge alleged specific facts of his discharge and of false statements made by the company to the unemployment office. These allegations supply the "factual" basis missing in Shell Oil.

Id., n. 4.

The Eighth Circuit's position then gives due deference to the legitimate concerns of the EEOC and respondents. It fulfills the Act's remedial purposes, while avoiding unauthorized audits or "fishing expeditions". *Shell Oil* v.

EEOC, 676 F.2d at 326. The Eighth Circuit's decision should be affirmed.

B. If a Charge is Filed which is Found to be Defective, the EEOC is not Authorized to Conduct an Investigation or to Enforce its Administrative Subpoena.

The courts have repeatedly recognized that a charge of discrimination, which is in some way jurisdictionally deficient, although ostensibly filed in accordance with the statutory and regulatory requirements, will not support the initiation or continuation of an investigation by the EEOC. In such circumstances the EEOC is without authority to proceed with an investigation grounded upon a deficient charge of discrimination, and a court is without jurisdiction to enforce a subpoena issued persuant thereto. *EEOC* v. *Dean Witter & Company*, 643 F.2d 1334, 1337 (9th Cir. 1980); *EEOC* v. *Sears, Roebuck & Company*, 490 F.Supp. 1245 (M.D. Ala. 1980); *Stewart* v. *Core Laboratories, Inc.*, 460 F.Supp. at 936 (N.D. Tex. 1978); *New Orleans Public Service, Inc.* v. *Brown*, 369 F.Supp. 713 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975).

As articulated by the court in *EEOC* v. *Appalachian Power Co.*:

> The charge in this case is simply not a valid charge, thus the EEOC had no jurisdiction to proceed with its investigation, and this court has no jurisdiction to hear this case. If there is no valid charge then the investigation and conciliatory procedures cannot be triggered because there is no jurisdictional board from which the EEOC might spring to those procedures.

13 FEP 1294, 1295-96 (W.D.Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978).

II. THE EEOC MAY NOT DEPRIVE RESPONDENTS OF THEIR RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION.

Subpoenas issued by administrative agencies are subject to the reasonableness requirements of the Fourth Amendment. *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). The determination of whether such administrative searches satisfy the Fourth Amendment involves three equally essential inquiries: whether the proposed search is authorized by statute, whether it is properly limited in scope, and whether the agency properly initiated the particular search. *United States* v. *Mississippi Power & Light Co.*, 638 F.2d 899, 907-08 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 387 (1981), *citing*, *Marshall* v. *Barlow's Inc.*, 436 U.S. at 320-21, 323.

The EEOC's subpoena fails to satisfy the Fourth Amendment test of reasonableness in all three respects: the investigation is not authorized under Title VII, the subpoena is unduly burdensome, and the manner in which it was initiated was unreasonable.

A. EEOC's Investigation is Unauthorized.

As already discussed at great length, EEOC's proposed search lacks statutory authorization because it lacks the mandatory statutory prerequisites of specific dates and circumstances. The EEOC has no general audit or plenary investigative authority; it may proceed only when specific written charges under oath have been filed in compliance with Title VII and Commission regulations. *See, supra*, pp. 4 to 10. Since the charge in this case fails in this respect, EEOC's attempt to use the commissioner's charge-filing process to target Shell's facilities for a span of years and for unspecified events constitutes nothing more than a general search which is prohibited under the Fourth Amendment.

B. The Proposed Search Is Unduly Burdensome.

The EEOC's investigation also fails to satisfy the second prong of the *Mississippi Power & Light* test, *i.e.*, it is not properly limited in scope. In *Marshall* v. *Barlow's*, *supra*, the Supreme Court specified that:

> Delineating the scope of a search is particularly important where documents are involved.

Id. at 324, n.22.

Even prior to *Barlow's*, the courts had long demonstrated concern for over-reaching on the part of agencies in otherwise valid investigations. The Fourth Amendment "guards against abuse only by way of too much *indefiniteness* or *breadth* in the things required to be 'particularly described', if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1945);[8] *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971) (Investigations "may be objected to on grounds of oppressiveness and as requiring an unreasonably burdensome compliance"); *New Orleans Public Service, Inc.* v. *Brown*, 369 F. Supp. at 707 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975) ("The EEOC's liberal investigative powers must not be confused with the periodically pursued, but nonexistent, right to ramble

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[8] *Oklahoma Press* is particularly instructive because it reflects the Supreme Court's thinking on the standards to be applied in the context of a court order for enforcement of a subpoena *duces tecum*. While the Court upheld the order of enforcement in *Oklahoma Press*, it noted pointedly that no "objection [had] been taken to the breadth of the subpoena or to any other defect which would invalidate them" 327 U.S. at 195 (footnote omitted).

See also, See v. *City of Seattle*, 387 U.S. at 544 ("it is now well settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

through a company's records purely in hope of discovering statutory violations").

In this case, the EEOC has issued a subpoena that is wide-ranging. It includes a large number of requests with numerous sub-parts, some of which are vague and generally incomprehensible. It includes requests for data that is proprietary and/or privileged in nature, and for data that would require the use of numerous hours of Shell's material and personnel resources.

The laundry lists of information illustrates that the subpoena issued in this case extends past the realm of reasonableness and is "of such a sweeping nature and so unrelated to [any] matter properly under inquiry as to exceed the [EEOC's] investigatory power." (citation omitted) *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1949). It therefore fails the second prong of the *Mississippi Power & Light* test.

C. EEOC's Method of Initiating the Investigation was Unreasonable.

A statutorily authorized search can only be found upon either (1) specific evidence of an existing violation; (2) a showing that reasonable legislative or administrative standards for conducting the search are satisfied with regard to the particular establishment; or (3) a showing that the search has been undertaken pursuant to an administrative plan containing specific neutral criteria. *United States* v. *Mississippi Power & Light Co.*, 638 F.2d at 907 (5th Cir. 1981). The EEOC has failed to point to any specific evidence of an existing Title VII violation, in order to justify its charge and investigation of Shell.

Further, the EEOC has failed to show that its decision to investigate Shell is based either on reasonable standards for inspection or on an administrative plan containing specific neutral criteria. The record demonstrates that

Shell's employment practices provided no basis for instigating an investigation against the company.

(a) Within the five years prior to the filing of the commissioner's charge, no charges of employment discrimination on the basis of race or sex had been filed against Shell's Wood River, Illinois refinery.

(b) Within the ten years prior to the commissioner's charge, only two charges of race or sex discrimination had been filed with either the Illinois Fair Employment Practices Commission or the EEOC. Both charges were dismissed.[9]

(c) As of December 31, 1979, the Wood River Refinery employed 1,757 persons, of whom 126 were black and 131 were female. Thus, as of that date, blacks and females constituted 7.2% and 7.5%, respectively, of the total work force at the Wood River Refinery.

(d) As of December 31, 1979, blacks and females constituted respectively 4.7% and 8.0% of the appropriate labor market for the Wood River Refinery.[10]

(e) Of the employees at the Wood River Refinery on December 31, 1979, who had been hired by Shell

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[9] Over the years 1973-1975, the Department of Interior/Office of Equal Opportunity, the predecessor of the Office of Federal Contract Compliance Programs, conducted a compliance review of Shell's Wood River facility. The review included a desk audit and an on-site investigation. Upon completion of the compliance review, the agency found Shell to be in compliance with Executive Order 11246, which is similar in purpose to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and which contains not only an anti-discrimination clause, but also an affirmative action obligation.

[10] During the compliance review mentioned in Footnote 9, *supra*, Shell and the reviewing agency reached agreement on the appropriate method for determining "availability" and the appropriate "local labor market" for the Wood River facility. Shell's data in item (c) through (f) were based on this agreed-upon method.

since July 2, 1965 (the effective date of Title VII), 12.3% were black and 9.8% were female.

(f) For the period beginning more than two years before the filing of the commissioner's charge, the hiring rate for blacks and females at the Wood River Refinery significantly exceeded their respective availabilities in the Wood River Refinery labor market. During this same period, promotions of blacks and females at the Wood River Refinery exceeded both the internal work force representation and the external Wood River Refinery labor market availability figures.

(g) The increases in black and female representation in the Wood River Refinery work force occurred despite the fact that the total number of employees at the Refinery declined by 23% over the ten years ending December 31, 1979.

Lacking objective criteria, the EEOC had no reasonable basis on which to launch its extensive investigation. The subpoena does not withstand scrutiny under the third prong of the *Mississippi Power & Light* test.

III. THE USE OF THE COMMISSIONER'S CHARGE IS AN INEFFICIENT MECHANISM FOR REMEDYING SYSTEMIC EMPLOYMENT DISCRIMINATION.

In addition to all of the foregoing, there are compelling reasons why the EEOC should not be permitted to proceed with its investigation of Shell Oil. First, this investigation, and others in which the Commission seeks to use the commissioner's charge as an auditing tool, simply does not further the agency's primary purpose, to ensure equal employment opportunities. The Commission's investigation of Shell provides a graphic example. As explained above, Shell's Wood River Refinery was audited and found to be in compliance with E.O. 11246 during the years 1973-1975. As recently as December 31, 1979,

blacks and females were employed at the Company at a rate that compared favorably to their availability in the labor market; within the two years preceding the filing of the charge blacks and females were hired and promoted at rates which exceeded their availability; within the five years preceding the filing of the charge, no individual charges had been filed against the Company. Against this backdrop, it is inconceivable why a commissioner's charge lodged against Shell would be considered consistent with the agency's responsibility.

Secondly, considering the competing demands on the EEOC's limited budget, the commissioner's charge as an auditing tool represents an inefficient use of its resources. One of the major problems facing the EEOC in past years has been its overwhelming backlog of cases. According to the testimony of its Chairman, Clarence Thomas, the backlog of charges at the agency was 45,000 as of June 15, 1982. *Examination of Certain Financial Management Practices Within the Equal Employment Opportunity Commission. Hearing Before the Committee on Labor and Human Resources. United States Senate*, 97th Cong., 2d Sess. 29 (1982). Fifty-two percent of those charges were between one and six years old. *Id.* at 34. In view of this tremendous backlog of charges filed by "real" people alleging that they have been subjected to unlawful employment practices, it appears illogical that the agency continues to pursue its own agenda of auditing companies, such as Shell. If the funds and personnel allocated to such charges were redirected to solving many of the backlogged cases, the Commission, as a whole, would function more efficiently in achieving its overall goals.

We hasten to add that the individual charge could serve as an effective tool for eliminating systemic discrimination. As the EEOC itself points out, enforcement actions under Title VII are not limited by the charge. *See*, Peti-

tion for Writ of Certiorari, p. 15. Rather, "[a]ny violations that the EEOC ascertains in the course of a reasonable cause investigation of the charging party's complaint are actionable." *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980). We submit that agency efforts limited to investigating charges filed by or on behalf of "real" victims, is more closely attuned to its goal of addressing problems of systemic discrimination.

Moreover, other remedial measures are available. For instance, class actions may be brought by private attorneys on behalf of alleged discriminatees, who may then collect reasonable attorneys' fees for their efforts. *See, Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

Third, the EEOC's commissioner's charge is a waste of government resources because it duplicates the OFCCP's Executive Order 11246 program. As stated in an April 9, 1981 report of the General Accounting Office:

> Given the changes OFCCP made to the contract compliance program and EEOC's issuance of affirmative action guidelines, the potential overlap between the two agencies has increased. Both agencies have essentially the same concerns in their enforcement activities and consider the same issues in their employer reviews.

GAO Report to the Congress, "Further Improvements Needed in EEOC Enforcement Activities" (April 9, 1981) p. 38.

Vital resources could be salvaged and used more advantageously if such investigations were confined to the OFCCP. As stated in the same GAO report:

> EEOC depends heavily on information OFCCP has on employers' personnel systems and practices to supplement its own data in preparing systemic charges.

> EEOC also continues to investigate employers as potential targets for its systemic program . . . even though OFCCP may have recently completed an investigation, planned to make one, or was conducting an investigation of the same employer.

Id. at 34. This is precisely what occurred with respect to Shell. As we discussed in footnote 9, *supra*, Shell was investigated by OFCCP's predecessors and found to be in compliance with the executive order. Nevertheless, EEOC felt that an additional audit was necessary.

Such duplication of government resources is nonsensical. The funds used to gather already gathered information or to transfer information from one agency to another could be used to improve the EEOC's troubled financial status, *GAO Report to the Chairman, Committee on Labor and Human Resources,* ("Financial Management Problems at the EEOC", October 30, 1981), and to investigate and conciliate many of the existing outstanding cases. It is especially important to emphasize that this auditing function, which we maintain is *ultra vires* for the EEOC, will not go undone. The OFCCP will continue to carry out this function. The only difference is that it will no longer be carried out twice.

Finally, such repeated investigations place a heavy burden on the employer, who may find himself forced to respond to an unlimited number of EEOC and OFCCP investigations. As stated by Senator Don Nickles in the June 15, 1982 Oversight Hearing, "there is no need for duplicating our resources or to place employers in a double bind." *Examination of Certain Financial Management Practices Within the Equal Employment Opportunity Commission, supra* at 34.

For all of these reasons, the use of commissioners' charges to conduct audits is unnecessary, unfair to the companies involved and a waste of agency resources.

CONCLUSION

For all of the reasons discussed in this brief, Amicus Chamber of Commerce urges the Court to affirm the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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